No. 18677

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT I. SAMSING,

Appellant,

vs.

S & P COMPANY, *et al.*,

Appellee.

BRIEF OF APPELLANT.

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Jurisdictional Statement.

This is an Appeal from a Judgment of Dismissal by the United States District Court for the Southern District of California, of plaintiff's Complaint. The Court's Judgment here appealed from was entered on March 7, 1963.

The action below was instituted by a Complaint filed by plaintiff against S & P Company, doing business as Maier Brewing Company, and Keller Street Development Company, defendants. In its three causes of action, the Complaint alleges that plaintiff was employed by defendants as a long line beer truck driver, and that from 1959 up to and including July 20, 1962, defendants failed and refused to pay to plaintiff, who was an employee in good standing, of driver's local No. 203 of the Teamster's Union, the wages and other

benefits to which he was entitled as an employee of said Union, as called for in various collective bargaining agreements in effect during said period between the plaintiff's said Local and Union, and the defendants and the California Brewers Association, and California Beer Wholesaler's Association, Inc.

Jurisdiction of the United States District Court was invoked under Section 301(a) of the Labor-Management Relations Act, 29 U. S. C., Section 185(a), Notice of Appeal from the District Court's Judgment of Dismissal was filed on April 3, 1963, and thus was timely. This Court's jurisdiction is founded on Title 28 U. S. C. Section 1291.

Statement of the Case.

This action is a suit for wages and other benefits claimed by plaintiff against defendants. During the period of his employment, plaintiff was a member of Local 203 of the Teamster's Union. He was a long line beer truck driver, employed by the defendants who own and operate Maier Brewing Company, manufacturer of beer.

The Complaint alleges three separate causes of action, each of which is identical in the relief sought, namely, money, but each of which covers a different period of time and differs as to the amount of claimed wages.

Starting in June, 1958, and continuing up to June 20, 1962, when plaintiff's employment was terminated, successive collective bargaining agreements were exe-

cuted by and between Teamster's Brewery and Soft Drink Manufacturers Joint Board of California (herein called the "Union"), and certain trade associations representing beer manufacturers such as defendants, namely, the California Brewers Association and California Beer Wholesalers Association, Inc. [R. 3.] The Union acted for and represented drivers such as plaintiff, and the associations above named acted for defendants and for others. This is not an unusual procedure in labor-management collective bargaining negotiations.

The Complaint further alleges that said collective bargaining agreements set forth the amount of mileage rates, regular straight time, hourly rates, loading and unloading rates, rates for mechanical failure, dead-heading pay, lay-over pay and subsistence pay that long line drivers were to receive; that plaintiff was a member in good standing of Local 203; that Local 203 is represented by said Union and "is included in the purview of its labor agreement with defendants". The Complaint also alleges that said labor agreements were negotiated and executed for the benefit of plaintiff and others similarly situated. [R. 3.]

Each cause of action of the Complaint alleges that defendants failed and refused to pay to plaintiff the wages and other payments he should have received according to said agreements, that he exhausted all of his administrative remedies provided for in said agreement, or that he has attempted to so comply. [R. 4.]

The Complaint alleges a total wage loss to plaintiff of $9,126.26 for the three causes of action. [R. 7.]

Defendants moved to dismiss on the ground that the District Court had no jurisdiction of the action, and on the further ground that the Complaint failed to state a claim upon which relief could be granted. [R. 10-11.] The motion was made on the Complaint alone, without supporting affidavits.) The Court granted defendants' motions, not on the grounds stated in defendants' motion, but on its own initiative, on the ground that "it appears upon the face of the Complaint and the attached by-laws, that the plaintiff has not exhausted the administrative remedies before the Union". [R. 14.]

Specification of Errors Relied On.

1. The District Court erred in dismissing the Complaint upon the grounds stated, namely, "that it appears upon the face of the Complaint and attached by-laws that plaintiff has not exhausted the administrative remedies before the Union".

2. The District Court erred in dismissing the Complaint on any grounds.

3. The District Court erred in failing to rule on defendants' Motion attacking the Court's jurisdiction.

Questions Presented.

1. If a Complaint alleges that the plaintiff exhausted all of his administrative remedies, or that he attempted to do so, and the exhibits attached to the Complaint contained copies of the collective bargaining agreement affecting plaintiff's rights, which patently do not apply to the situation, does the District Court commit error in dismissing the Complaint upon the ground that it appears upon the face of the Complaint and attached by-laws that plaintiff has not exhausted the administrative remedies before the Union?

2. Does the District Court commit error when it dismisses a Complaint and orders Judgment of Dismissal, without allowing plaintiff a right to amend?

3. Does a District Court have jurisdiction of a suit by a wage earner against his former employer for wages under Section 301a of the Labor Management Relations Act?

4. Does a District Court commit error when it dismisses a Complaint upon a ground not urged by defendants (other than lack of jurisdiction), but upon a ground raised by the Court of its own initiative?

5. Does a District Court commit error when it fails to rule upon its own jurisdiction when that point is raised by the defendants' Motion to Dismiss?

ARGUMENT.

Summary of Argument.

The Complaint specifically and clearly alleges that plaintiff exhausted his administrative remedies and there is nothing in the attached exhibits to contradict said allegation, and it was therefore error for the District Court to dismiss the Complaint on that ground. Furthermore, if the District Court felt that said allegation was not precise enough, or was legally insufficient, it should have allowed plaintiff to amend. The defendants urged the dismissal on the ground that the Court had no jurisdiction and that the Complaint did not state a claim upon which relief could be granted. Plaintiff urged that the Court had jurisdiction under Section 301(a) of the Labor Management Relations Act, but the Court failed or refused to pass upon that point and urged the stated point of no exhaustion of administrative remedies. Furthermore, the Court should have considered and ruled upon the question of jurisdiction and should have sustained the Court's jurisdiction here. The Court should not have raised a point on its own initiative.

I.

The District Court Should Not Have Dismissed the Complaint on the Ground That Plaintiff Had Not Exhausted His Administrative Remedies.

Each of the three causes of action alleges that plaintiff exhausted his administrative remedies or that he attempted to do so. Attached to the Complaint are copies of the collective bargaining agreements that cover plaintiff's rights. The District Court erroneously refers to exhibits as "bylaws". [R. 14.] Section

29 of the collective bargaining agreement, 1960-1962, on page 66 thereof, sets forth the machinery for the adjustment of disputes. The machinery for settlement of grievances is not important here.

Whether plaintiff did or did not seek exhaustion of his administrative remedies is a matter for plaintiff to prove at the trial. It is a question of fact. Defendants presented no affidavits in support of their Motion to Dismiss to contravene plaintiff's allegations. It is not the province of the District Court Judge to raise questions of plaintiff's proof in said Motion.

No matter how likely it might seem, that the plaintiff will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it.

John E. Weinrich v. Retail Credit Co., etc., 186 F. Supp. 392;

Continental Colleries, Inc. v. Shober. Jr., 130 F. 2d 631, 635;

Kirke v. Texas Co., 186 F. 2d 643.

Under the Federal Rules of Civil Procedure, in weighing the validity of a Motion to Dismiss, the duty of the Court is not to test the final merits of the claim in order to determine which party is to prevail, but the duty of the Court rather is to consider whether in the light most favorable to plaintiff, and with every intendment regarded in his favor, the Complaint is sufficient to constitute a valid claim.

Tahir Erk v. Glenn L. Martin Co., 116 F. 2d 865;

John Walker & Sons, Ltd., v. Tampa Cigar Co., Inc., 197 F. 2d 72.

Where a bona fide Complaint is filed, that charges every element necessary to recovery, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified, since a party has a right to call for more facts under the Federal rules, if needed.

> *United States v. Employing Plasterer's Association of Chicago, et al.,* 347 U. S. 186, 189, 74 S. Ct. 452, 98 L. Ed. 618.

The well pleaded allegations of the Complaint must be taken as true under a motion to dismiss.

> *Dawson v. Delaney,* 189 F. Supp. 416.

In the *Dawson* case, *supra,* defendants moved for a dismissal, for the reason that plaintiffs failed to exhaust their remedies under the constitution of the International Union. The Court said on page 418:

> "(5) Next, the defendants move for dismissal for the reason that the plaintiffs have failed to exhaust their remedies under the Constitution of the International Union. At this stage of the proceeding, little need be said about this argument, because, on a motion of this sort, the well-pleaded allegations of the complaint must be taken as true. The last portion of paragraph 20 of the amended complaint is as follows:
>
> '* * * An appeal was taken by the local from the said order to the General Executive Board, but the said board has failed to hold any hearing and has advised the local's representatives that they will not be permitted the right of counsel when such a hearing is held in the future. A true and correct copy of the appeal filed with the General Executive Board from the

order invoking supervision is hereto attached and marked Exhibit 1.'

"Inasmuch as this allegation is not formally controverted, it must be taken as true, at least for the present. Moreover, it is perhaps desirable that, aside from this particular point, the plaintiffs be permitted to introduce evidence at trial from which it may or may not appear that they can bring themselves within one or more of the exceptions to the rule requiring that, before instituting court action, complainants must first exhaust all administrative remedies provided in the Union charter."

II.

The District Court Should Have Allowed Plaintiff to Amend His Complaint.

Assuming, without admitting the fact, that there was a defect on the face of the Complaint, the Court below should have allowed the plaintiff to amend, even though no such request was made by plaintiff.

In order to justify a dismissal of a Complaint for insufficiency, it must appear as a matter of law that under no state of facts which could be proved in support of the claims pleaded, would the plaintiff be entitled to any relief.

Dutton, et al. v. Cities Service Defense Corporation, 197 F. 2d 458;

Local 149 Boot & Shoe Workers Union, etc. v. Faith Shoe Company, 201 F. Supp. 234;

Hughes v. Local 11 International Association of Bridge, etc., 287 F. 2d 810;

Mitchell v. E-Z Way Towers Inc., 269 F. 2d 126.

If the District Court was correct in its statement that it is apparent on its face that plaintiff has not exhausted his administrative remedies, perhaps plaintiff could allege in more detail, if required, what he did to exhaust said remedies. This would certainly allow the matter to be tried on the merits. But again there is nothing on the face of the complaint and the attached exhibits that support the trial court's ruling which was clearly erroneous.

Perhaps the Court confused a motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b), with a motion for a more definite statement under Rule 12(e). The Court, in the *Mitchell* case, *supra,* quoting from *Conley v. Gibson,* 355 U. S. 41, 78 S. Ct. 103, at page 130 of 269 F. 2d said:

> ". . . the federal rules of civil procedure do not require a claimant to set out the facts upon which he bases his claim. To the contrary, all the rules require is a 'short and plain statement of the claim' that will give . . . notice of what the plaintiff's claim is, and the grounds upon which it rests."

Rule 15(a) of the Federal Rules of Civil Procedure provide that leave of Court to amend be freely given when justice so requires.

Fuhrer v. Fuhrer, 292 F. 2d 140;
McHenry v. Ford Motor Co., 269 F. 2d 181;
Kingwood Oil v. Bell, 204 F. 2d 8, 13.

III.

The District Court Has Jurisdiction Under Section 301(a) of the Labor-Management Relations Act.

Plaintiff alleges in his Complaint for wages and for breach of the collective bargaining agreements that the District Court has jurisdiction under Section 301(a) of the Labor-Management Relations Act. This was disputed by defendants and was one of their grounds of attack of the complaint.

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C., Section 185(a) reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties."

It is obvious that this Section confers jurisdiction on the District Court of plaintiff's suit. The collective bargaining agreement was made for the benefit of plaintiff and other members of the Union and this is a suit for violation of said contract. The point was clearly stated and settled by the United States Supreme Court in the recent case of *Doyle Smith v. Evening News Assn.,* 371 U. S. 195, 83 S. Ct. 267, decided December 10, 1962. This case supports plaintiff's position here and states that the District Court has jurisdiction.

See also:

Local 174 Teamster's, etc. v. Lucas Flour Company, 369 U. S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593;

Charles Dowd Box Co. v. Courtney, 368 U. S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483;

Atkinson v. Sinclair Refining Company, 370 U. S. 238, 82 S. Ct. 1318, 8 L. Ed. 2d 462.

IV.

The District Court Commits Error When It Dismisses a Complaint Upon a Ground Not Urged by Defendants.

The defendants moved to dismiss because of lack of jurisdiction of the District Court under Section 301(a) of the Labor Management Relations Act, *supra,* and because the Complaint does not state a claim upon which relief can be granted. Counsel for the defendants urged these points in his argument, but the Court, although it may have considered them, based its ruling upon an entirely different point, namely, failure to exhaust administrative remedies. The Court erred in raising this point on its own initiative.

Roloff v. Perdue, 31 F. Supp. 739.

In this case the Court said on page 743:

". . . may the Court on its own motion dismiss the complaint on the broad ground of "failure to state a claim upon which relief can be granted"?

"Now, it is true that under Rule 12(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, this defense may be asserted by motion

'at the option of the pleader.' I incline to the opinion, however, that the Court, at least in the circumstances here present, cannot assert the defense on its own motion. Such procedure would deprive the plaintiffs of their right to amend, if per chance amendment is found feasible. I am, therefore, constrained to the conclusion that the defendants' motion to dismiss must be overruled . . .".

V.

The District Court Should Have Passed Upon the Question of Jurisdiction When Raised by the Defendants.

The defendants' Motion to dismiss attacked the Court's jurisdiction, but the Court failed to rule on this point. This is error.

Federal Rules of Civil Procedure, Sec. 12(h), 28 U.S.C. provides:

> "Whenever it appears by suggestion of the parties or otherwise, that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action . . ."

Ambassador East v. Orsatti, Inc., 155 F. Supp. 937, 938;

Page v. Wright, 116 F. 2d 449, 453.

So long as the question of the Court's jurisdiction was raised and argued by the defendants, the plaintiff was entitled to a ruling in order to get this question disposed of and foreclose the possibility of the Court's

jurisdiction being attacked at a later time, to the waste of time of the parties and of the court.

Wherefore, appellant respectfully requests that this Court reverse the decision of the District Court.

Respectfully submitted,

ERWIN MORSE,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ERWIN MORSE